

EXHIBIT A

8/16/2007 Maronick, Thomas

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRAFFICSCHOOL.COM, INC.,)
a California corporation;)
DRIVERS ED DIRECT, LLC,)
a California limited liability)
company,) CASE NO.
) CV 06-7561 PA
Plaintiffs,) (CWx)
)
vs.)
)
EDRIVER, INC., ONLINE GURU, INC.,)
FIND MY SPECIALIST, INC., and)
SERIOUSNET, INC., California)
corporations; RAVI K. LAHOTI, an)
individual; DOES 1 to 10,)
)
Defendants.)
)

DEPOSITION OF THOMAS MARONICK, DBA, taken on behalf of the defendants at 333 South Hope Street, 48th Floor, Los Angeles, California, beginning at 9:41 A.M., and ending at 3:58 P.M., on Thursday, August 16, 2007, before Lena Mescall, Certified Shorthand Reporter No. 13018.



8/16/2007 Maronick, Thomas

1 APPEARANCES:

2

3 FOR THE PLAINTIFFS:

4 LEWIS, BRISBOIS, BISGAARD & SMITH, LLP

5 BY: DAVID N. MAKOUS, ESQ.

6 221 N. Figueroa Street, Suite 1200

7 Los Angeles, California 90012

8 (213) 250-1800

9

10 FOR THE DEFENDANTS:

11 SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP

12 BY: BRIAN M. DAUCHER, ESQ.

13 650 Town Center Drive, 4th Floor

14 Costa Mesa, California 92626

15 (714) 513-5100

16

17 ALSO PRESENT: Eric Creditor

18

19

20

21

22

23

24

25



8/16/2007 Maronick, Thomas

		INDEX	
1			
2	WITNESS	PAGE	
3	Thomas Maronick, DBA		
4			
5	Examination by Mr. Daucher	5	
6			
7		EXHIBITS	
8	MARKED	DESCRIPTION	PAGE
9	141	Amended Notice of Deposition of Dr. Thomas J. Maronick and Request for Production of Documents	16
10	142	Expert Report of Dr. Itamar Simonson	27
11	142A	Expert Report of Dr. Itamar Simonson with annotations	148
12			
13	143	Advertising Research Issues from FTC versus Stouffer Foods Corporation, Journal of Public Policy and Marketing	49
14			
15	144	Expert Report of Thomas J. Maronick, DBA, JD	67
16	145	A Reading Test or a Memory Test; Which Survey Methodology is Correct?	
17			
18	146	Trademark Reporter	105
19	147	E-mail dated 6-18-2007	223
20			
21	148	Expert Report of Thomas J. Maronick, DBA, JD	229
22			
23	148	Rebuttal of Expert Report of Daniel S. Janal	233
24	149	Declaration of Kenneth A. Hollander	252
25	150	Declaration of Kenneth A. Hollander Addendum to August 5, 2007, Declaration	252

EXHIBIT A
PAGE 10

8/16/2007 Maronick, Thomas

1 into your study the assumption that people wouldn't
2 spend very much time on any Web site; is that correct?

3 A. No. That's not correct.

4 Q. Did you make any assumption about the amount of
5 time that a visitor would spend on the DMV.org Web site
6 in constructing your study?

7 A. I didn't make an assumption. I gave them
8 directions to -- in my study, in designing the study, to
9 read it carefully, to take as much time as they needed
10 to read it. So I wasn't making an assumption how long
11 they'd do it. I gave them directions to read it
12 carefully.

13 Q. A single page; correct?

14 A. The page that they saw.

15 Q. Actually, only a portion of a single page;
16 correct?

17 A. The page that they saw.

18 Q. Was it only a portion of the page, or could
19 they see the whole page?

20 A. They saw only the top part of it, but the later
21 part of it was basically a whole lot of white space. So
22 they had all -- in my judgment, all the relevant
23 information.

24 Q. You're aware that the bottom of the page
25 includes a disclaimer; correct?

EXHIBIT A
PAGE 11

8/16/2007 Maronick, Thomas

1 A. I am.

2 Q. And that was not visible to the respondents to
3 your study; correct?

4 A. That's correct.

5 Q. And you're aware that it's possible that
6 visitors to the DMV.org Web site won't visit more than
7 one Web page while they're on that site; correct?

8 A. It depends on how they get to it.

9 Q. Well, even if they come directly to the
10 California Traffic School page that you use, it's
11 possible they could visit other pages; correct?

12 A. It's --

13 MR. MAKOUS: You'd see it before or after?

14 MR. DAUCHER: Yeah. Before -- yeah. After
15 coming to that page, yes.

16 THE WITNESS: After that page, yes. Before
17 that page, no. Because of the way, again, the study,
18 the approach that was taken, which was to go use the
19 DMV.org link to go directly to the Traffic School page.

20 BY MR. DAUCHER:

21 Q. There are other ways to arrive at that page on
22 the DMV.org Web site. You're aware of that; correct?

23 A. Yes.

24 Q. Do you know what percentage of DMV.org visitors
25 that view the California Traffic School page view that

EXHIBIT A
PAGE 12

8/16/2007 Maronick, Thomas

1 A. No. I don't recall discussing with counsel.

2 Q. Do you believe you did not discuss it with
3 counsel, or you just don't know?

4 A. I don't recall. I simply don't recall.

5 Q. But for whatever reason, you declined to use a
6 control in this case; correct?

7 A. I chose to not use one because I -- quite
8 frankly, I couldn't think of one that would meet -- even
9 using Simonson's language, would be a proper "control."
10 I couldn't conceive of one that would be an appropriate
11 control in this case.

12 Q. There's literature on what an appropriate
13 control is; correct?

14 A. Yes.

15 Q. You've written literature on what a proper
16 control is; correct?

17 A. Yes.

18 Q. One way to do a proper control is to change the
19 portion of the advertisement which contains the
20 allegedly misleading information; correct?

21 A. Yes.

22 Q. Did you consider doing that in this case?

23 A. Yes, I did. But, again, my problem was I
24 couldn't think of something that would change it in a
25 way that would still be relevant to the target market --

EXHIBIT A
PAGE 13

8/16/2007 Maronick, Thomas

1 namely, people considering an online traffic school --
2 and would also deal with the issue of the Department of
3 Motor Vehicles. I couldn't conceive of something that
4 would be realistic for this target market, and that's
5 where my problem was.

6 Q. And this is a Lanham Act case. You understand
7 that; correct?

8 A. Yes.

9 Q. Do you -- are you familiar with the Lanham Act?

10 A. Yes.

11 Q. Do you know which -- you're familiar that
12 Section 1125(a) of the Lanham Act has two prongs;
13 correct?

14 A. I don't recall the individual sections of it.
15 It's been a long time since I've actually reviewed the
16 Lanham Act specifically.

17 Q. Do you believe that this is a sponsorship or
18 endorsement case?

19 A. I'm sorry. I don't --

20 MR. MAKOUS: Objection. It calls for a legal
21 conclusion. Beyond the scope of his expert opinion.

22 BY MR. DAUCHER:

23 Q. Did you have an understanding during your work
24 on this case as to whether this case was brought as a
25 sponsorship or an endorsement type case?

EXHIBIT A
PAGE 14

8/16/2007 Maronick, Thomas

1 BY MR. DAUCHER:

2 Q. That's the fifth question, "Whose Web site do
3 you think this is?"

4 MR. MAKOUS: Which survey is this?

5 MR. DAUCHER: It's the third survey.

6 THE WITNESS: Survey 3.

7 MR. MAKOUS: It's the last survey here? Okay.

8 THE WITNESS: Yes. That's it.

9 BY MR. DAUCHER:

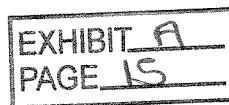
10 Q. And then you asked the question which gets to
11 this case, "Is this Web site endorsed by a government
12 agency"; correct?

13 A. Again, my -- your question to me do I -- did I
14 start with a closed-end question? The answer is no.
15 Question 5 is an open-ended question.

16 Q. But it doesn't get to the question whether
17 there's sponsorship or endorsement in this case, does
18 it?

19 A. It starts -- it identifies whether the
20 respondents to this study identify DMV.org, the Web
21 site, this Study 3, the Web page, as being of a Web page
22 of the Department of Motor Vehicles. So to that extent,
23 it gets to the issue of whose Web site it is.

24 Q. But then Question 6 you would agree is a
25 closed-end question, "Is this Web site endorsed by any



8/16/2007 Maronick, Thomas

1 government agency?"

2 A. That's correct. But keep in mind that question
3 follows Question 5, which was the open-ended question.

4 Q. I got it.

5 Now, at the same time the viewer is answering
6 Question 6, they can see Question 7 on the screen;
7 correct?

8 A. I believe they can.

9 Q. And Question 7 reads, "What government agency";
10 correct?

11 A. Yes.

12 Q. And even if the viewer checks "no" on
13 Question 6, you're still asking them to answer
14 Question 7; correct?

15 A. I don't believe that's the case. I think if
16 they -- if they click "no," they didn't answer
17 Question 7. I don't recall that, though.

18 Q. Okay. Looking at these materials which you
19 produced today, can you tell me how many people, how
20 many numbers-wise, people answered Question 6 "yes"?

21 A. Question 6 "yes"? One hundred.

22 Q. Okay. So you would only expect that 100 of
23 those 100 people would be asked Question 7; correct?

24 A. That's what I would expect.

25 Q. And can you flip back to the answers to

EXHIBIT A
PAGE 16

8/16/2007 Maronick, Thomas

1 Question 7, please. How many responses?

2 A. One hundred.

3 Q. Can I see that, please. So if they answer
4 Question 6 "no," they skip to Question 8?

5 A. That's the way I designed it.

6 Q. Okay. But you designed it so that they could
7 see Question 7 while they're answering Question 6?

8 A. That's correct.

9 Q. Is that normal to put two questions up at the
10 same time?

11 A. In this kind of a context where the first
12 question is a screener question, in effect, a filtered
13 question, it is an acceptable procedure, yes.

14 Q. In your view it's an acceptable procedure?

15 A. That's correct.

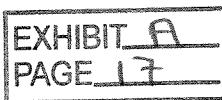
16 Q. You don't think there's any chance that by
17 putting that Question 7 up there, below Question 6, that
18 that's going to bias the answers that people are going
19 to give to Question 6? Any chance?

20 A. No. I don't think so.

21 Q. You could have put Question 7 on a different
22 page; correct?

23 A. That's correct.

24 Q. Okay. Will you turn to page 9 of Simonson's
25 report, please, paragraph 21.



8/16/2007 Maronick, Thomas

1 A. Twenty-one, yes.

2 Q. Simonson quotes -- or says, "As
3 Professor McCarthy points out, survey questions must not
4 be slanted or leading, and it is improper to suggest a
5 business relationship when the respondent might
6 previously have had no thought on such a connection."

7 Do you see that?

8 A. Yes.

9 Q. Do you generally agree with those statements?

10 A. I agree with the statement that a survey
11 question must not be slanted or leading. Yes. I agree
12 with that.

13 Q. Do you believe it's improper to suggest a
14 business relationship when the respondent might
15 previously have no thought on such a connection?

16 A. I agree with that.

17 Q. And did you follow those principals, in your
18 view --

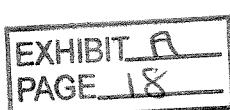
19 A. I believe I did, yes.

20 Q. -- in this study?

21 A. Yes, I did.

22 Q. So you believe that your Question 6, where you
23 ask, "Is this Web site endorsed by any government
24 agency," is not a leading question?

25 A. Again, Question 6 follows Question 5 where they



8/16/2007 Maronick, Thomas

1 were asked, first of all, what government agency. So by
2 getting -- if a respondent says that it is the
3 Department of Motor Vehicles, then they were likely in
4 that question to say, "Yes, it was."

5 And so I don't believe it's leading because
6 you're really focusing on responses after the open-ended
7 questions.

8 Q. So you don't believe Question 6 is a leading
9 question?

10 A. No. Again, because it follows Question 5.
11 It's what's called a "funneling approach," and I don't
12 believe it's a lead-in question at all.

13 Q. Funneling. Now, regardless of what answer
14 someone gives to 5, they're still going to answer 6;
15 correct?

16 A. That's correct.

17 Q. So there is no screening out of people from 5
18 to 6; correct?

19 A. That's correct.

20 Q. So does the word -- does the funneling concept
21 really apply in that case?

22 A. Yes, it does.

23 Q. Are you familiar with the concept of "demand
24 effects" --

25 A. Yes.

EXHIBIT A
PAGE 17

8/16/2007 Maronick, Thomas

1 Question 7.

2 Q. As far as I could tell, this is the only point
3 in the survey where there are two questions on one page;
4 is that correct?

5 MR. MAKOUS: You mean Survey 3, Counsel?

6 MR. DAUCHER: Yeah. Survey 3.

7 THE WITNESS: In both -- I think the same is
8 true with 8 and 9.

9 BY MR. DAUCHER:

10 Q. Similar type of situation, what government
11 agency?

12 A. That's correct.

13 Q. Why did you put them together?

14 A. It just seemed to me that was the most
15 realistic way for someone to say -- if they're thinking
16 about is this endorsed by a government agency, for them
17 to know I'm going to ask them which one. It makes it
18 more likely for them to think about it.

19 Q. So you do want them to be thinking about
20 Question 7 while they are answering Question 6; correct?

21 A. I'm sorry. I want them to do what?

22 Q. You want them to be thinking about Question 7
23 while they're answering Question 6. That's what you
24 just said.

25 A. Question 6 is, "Is it" -- I want them to be

EXHIBIT A
PAGE 20

8/16/2007 Maronick, Thomas

1 thinking about question -- Question 6, "Is this endorsed
2 by a government agency?" I want them to be thinking
3 about that.

4 Q. No, sir. My question was you want them to be
5 thinking about Question 7 while they're answering
6 Question 6. Isn't that true?

7 A. No. I want them to be thinking about the Web
8 site. The Question 6 asks a very straightforward
9 question, "Is this Web site endorsed by a government
10 agency?" That's a discrete question.

11 And then knowing that if they say "yes," or
12 when they say "yes" to that, they're going to be asked
13 what government agency.

14 Q. When they say "yes"; right?

15 A. That's correct. If they say "yes." If they
16 say "yes," not when. If they say "yes."

17 Q. Will you look at page 10 of Dr. Simonson's
18 report, paragraph 24.

19 A. Yes.

20 Q. He cautions, "Accordingly," in the second
21 sentence, "it is a standard survey procedure to
22 explicitly instruct respondents not to guess, and such
23 an instruction decreases, though does not eliminate, the
24 tendency to guess."

25 Do you agree with those general principals?

EXHIBIT A
PAGE 21

8/16/2007 Maronick, Thomas

1 A. It depends on the nature of the survey.

2 Q. You gave no such instruction in this case;
3 correct?

4 A. Again, because of the nature of the survey.

5 Q. Just yes or no.

6 A. No. I did not give it because of the nature of
7 the survey.

8 Q. So you think in some surveys it's not a
9 standard procedure to explicitly instruct respondents
10 not to guess as to the answer?

11 A. That's correct.

12 Q. Now, in this survey you thought that procedure
13 would be inappropriate?

14 A. I thought it was unnecessary because of the
15 nature of the study, which is a perception study. This
16 isn't -- you normally would ask -- tell a respondent not
17 to guess if you're asking factual questions from an ad.
18 Here I'm asking simply for their perceptions of what
19 they see or take away from the -- in this case either
20 the Web page or the Internet link. So I don't believe
21 it's appropriate or necessary to say -- to tell them not
22 to guess.

23 Q. This Question 6 -- isn't that a factual
24 question, "Is this Web site endorsed by any government
25 agency?"

EXHIBIT A
PAGE 22

8/16/2007 Maronick, Thomas

1 A. That's correct.

2 Q. Did you write an article entitled "Advertising
3 Research Issues from FTC versus Stouffer Foods
4 Corporation"?

5 A. Yes, I did.

6 Q. I'll show you a document which we'll have
7 marked for identification as 143.

8 (Exhibit 143 was marked for
9 identification by the reporter and is
10 attached herewith.)

11 BY MR. DAUCHER:

12 Q. Sir, can you confirm for me that 143 is a
13 correct copy of the article I referenced, "Advertising
14 Research Issues from FTC versus Stouffer Foods
15 Corporation"?

16 A. Yes.

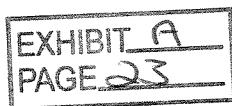
17 Q. And it lists you as an author. So you were an
18 author of this article; correct?

19 A. That's correct, yes.

20 Q. It was published in 1995. Have survey
21 standards changed dramatically since then?

22 MR. MAKOUS: Objection. Vague as to
23 "dramatically." Argumentative.

24 THE WITNESS: Have research issues changed?
25 Research methodologies have changed because of the



8/16/2007 Maronick, Thomas

1 advent of the Internet, which was not predominant in
2 1995.

3 BY MR. DAUCHER:

4 Q. In terms of the conclusions of the article,
5 though, have any of these conclusions been, to your
6 knowledge, discredited since the time of the publication
7 of this article?

8 A. I don't recall what the conclusions were.

9 Q. Well, will you look to page 302 of the article,
10 which is the second page of this exhibit, in the
11 right-hand column, it says: "General Standards for FTC
12 Advertising Copy Tests."

13 A. Yes.

14 Q. It says, "The standard the Commission uses in
15 evaluating advertising claims is the," quote, "'overall
16 net impression made by the ad,'" unquote.

17 Do you see that?

18 A. Yes.

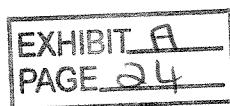
19 Q. Do you agree with that?

20 A. Yes.

21 Q. And do you agree that in the context of a false
22 advertising case, that that is the proper standard to be
23 applied?

24 A. The overall net impression, yes.

25 Q. On page 303, under "Design Issues," the first



8/16/2007 Maronick, Thomas

1 sentence says, "One study design issue, receiving
2 perhaps the most recent attention by the FTC, is that of
3 the appropriate controls," in italics, "to use to
4 enhance the validity of the results."

5 You wrote that?

6 A. Yes.

7 Q. You wrote, "The use of a control ad group, e.g.
8 respondents who see a control rather than a test ad, may
9 help to ensure that responses to the challenged ad
10 claims are not due to factors other than the challenged
11 ad claims in question."

12 Do you agree with that statement?

13 A. Correct.

14 Q. You wrote that; correct?

15 A. Yes.

16 Q. "In addition, certain copy test questions may
17 prompt biasing, such as a yea-saying response."

18 Do you see that sentence?

19 A. Yes.

20 Q. What is a "yea-saying response"?

21 A. A tendency for respondents to say yes.

22 Q. Isn't it true that Question 6 that we were
23 looking at is a yea-saying question?

24 A. I don't think that at all.

25 Q. Isn't it true that you could have written

8/16/2007 Maronick, Thomas

1 responses are tabulated, but I was able to go through
2 and see if there were any problems with it with the
3 different skip patterns. I also had made it possible
4 for counsel to look at it to see if they saw any
5 problems with it. Again, not to change content, but
6 just to make sure the procedures are correct.

7 Q. And you would agree, based on your writing,
8 that leading questions would be a problem in a survey;
9 correct?

10 A. That's correct.

11 Q. But your contention is that this survey does
12 not contain leading questions? Survey 3?

13 A. That's correct. As I said numerous times now,
14 because of two things. Number one, it follows
15 Question 5, which is an open-ended question. And
16 Question 6 simply asks a very straightforward -- six --
17 yes -- "Is it endorsed by a government agency," with the
18 option of them saying "no" or "don't know."

19 Q. And you also wrote in the final paragraph,
20 above "Experience Counts," on page 303, that it is -- or
21 quoted the ALJ that, "It is not appropriate to start a
22 copy test with closed-ended questions"; correct?

23 A. Yes. And that's why my study started with the
24 open-ended question.

25 Q. In your opinion.

EXHIBIT A
PAGE 26

8/16/2007 Maronick, Thomas

1 MR. MAKOUS: Objection. Multiple questions
2 again. Compound.

3 THE WITNESS: I can't say.

4 BY MR. DAUCHER:

5 Q. And let's say that a user could theoretically
6 still write an answer for 7 even if they put "no" or
7 "not sure" for 6. Okay?

8 Now, in that case, it's also true that a user
9 could go back and change their answer to 6 -- correct --
10 before hitting the "Submit" button?

11 MR. MAKOUS: Okay. Wait, wait, wait.

12 Objection. That's six questions.

13 Dr. Maronick, have counsel ask you one question
14 and answer it. Stop with this colloquy, both of you.
15 This is vague and ambiguous. You can't answer all six
16 of the questions that are posed there in your answer.

17 So I ask counsel to withdraw the question --

18 MR. DAUCHER: I do not.

19 MR. MAKOUS: -- and ask one question.

20 MR. DAUCHER: It's very clear on the record.

21 MR. MAKOUS: It is not clear at all.

22 BY MR. DAUCHER:

23 Q. Do you understand the question?

24 A. No. I don't understand the question.

25 Q. Okay. I'm asking you to assume a couple of